

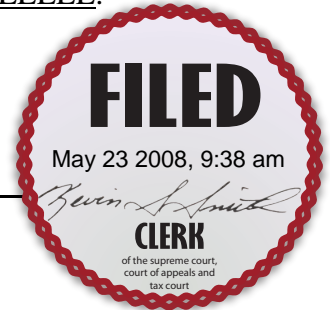
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of the case.

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**IN THE
COURT OF APPEALS OF INDIANA**

MARILYN LOWE,

Appellant-Respondent,

vs.

MELVIN LOWE,

Appellee-Petitioner.

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No. 91A02-0704-CV-366

APPEAL FROM THE WHITE CIRCUIT COURT
The Honorable Robert W. Thacker, Judge
Cause No. 91C01-0603-DR-35

May 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Marilyn Lowe (“Wife”) appeals the trial court’s award of rehabilitative maintenance and its decision that she should not receive the survivor benefit of the civil service offset annuity of her ex-husband, Melvin Lowe (“Husband”). Wife raises two issues, which we restate as:

- I. Whether the trial court properly awarded her rehabilitative maintenance and not incapacitation maintenance; and
- II. Whether the trial court properly denied her request that she be awarded the survivor benefit of Husband’s civil service offset annuity.

We affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

Wife and Husband were married on December 31, 1965. During the marriage, Wife suffered from Lyme disease and did not work outside the home for any substantial period of time. Husband worked for the United States Postal Service (“USPS”) and also recently began working at Wal-Mart. On December 21, 2005, the couple separated.

On January 17, 2006, Husband petitioned for dissolution. On November 13, 2006, a final hearing was held on the petition. The parties submitted proposed findings of fact and conclusions thereon. On January 26, 2007, the trial court issued its final order, which provided in part:

4. The Husband is employed by the [USPS] earning approximately \$51,818.00 per year, and at Wal-Mart earning approximately [\$14,850.00] per year. The Wife is unemployed and has not worked outside the parties’ home for most of the parties’ 41-year marriage. The Wife suffers from Lyme disease and as a result of her medical conditions, she has not sought employment. She testified that the disease causes weakness, numbness, and paralyzation. The Wife is 60 years old and has not had significant employment experience outside her home during the course of the parties’

marriage. The Husband is aware of the Wife's medical condition, and the parties have together spent significant time, effort, and expense to treat the disease.

* * * * *

6. The Court finds that the Wife has not been employed during the marriage for a number of years prior to final separation. The Court finds that the Wife is not incapacitated under I.C. 31-15-7-1,¹ in that she is able to drive a vehicle and work in at least a part time capacity and has not been under a doctor's care or on any pain or other medication in over three years for her chronic medical condition. However the Court does find that the Wife is entitled to the following as rehabilitative maintenance pursuant to I.C. 31-15-7-2(3) based upon her limited earning capacity, her lengthy absence from the job market, and the time and expense necessary to enable the Wife to find appropriate employment:

a. As rehabilitative maintenance, the Husband shall pay to the Wife the sum of \$1200.00 per month for a period of 36 months beginning February 1, 2007 and the first day of the month thereafter until fully paid;

* * * * *

10. The Husband is 63 years of age and is an employee of the [USPS]. The Wife is 60 years of age and is unemployed and has not been employed for most of the marriage. The parties were married on December 31, 1965 and separated on December 21, 2005. The Husband has the following retirement benefits: A Civil Service Offset Annuity, a Thrift Savings Plan through the [USPS] valued at approximately \$5061.17, a 401(k) plan through Wal-Mart valued at approximately \$2682.90, and a Lincoln National IRA valued at approximately \$20,165.53.

11. The Husband and the Wife shall each be awarded by QUADRO [sic] one-half of the Lincoln National IRA, one half of the [USPS] Thrift Savings Plan, and one-half of the Wal-Mart 401(k) plan, all as of December 31, 2005.

12. The Wife shall be awarded a pro rata share of the Husband's Civil Service Offset Annuity equal to one half the gross annuity without

¹ In the absence of argument to the contrary, we assume the trial court inadvertently cited IC 31-15-7-1 instead of IC 31-15-7-2(1).

reduction for survivor annuity and after Social Security offset as earned from the date of the marriage through December 31, 2005. If the Wife elects available health insurance coverage, the cost of the premiums shall be deducted from her share of the annuity payment. The Wife is not awarded a survivor annuity. . . .

* * * * *

14. The Court in its distribution of the marital assets and debts determines from the evidence and exhibits that the Husband has been awarded approximately 39% of the net marital estate and the Wife has been awarded approximately 61% of the net marital estate. Further, the Court has awarded rehabilitative maintenance to the Wife. The Court has deviated from the presumption of equal distribution due to the Husband's superior earning capacity.

Appellant's App. at 8-12.

On February 22, 2007, Wife filed a motion to correct error. On March 23, 2007, after a hearing, the trial court denied Wife's motion to correct error. Wife now appeals.

DISCUSSION AND DECISION

Although it does not appear that either party requested findings and conclusions prior to the final hearing as required by Indiana Trial Rule 52(A), the trial court entered findings and conclusions. Regarding the maintenance issue, because the statute requires findings in order to award maintenance, we treat the court's findings as "special findings." *Cannon v. Cannon*, 758 N.E.2d 524, 526 (Ind. 2001); IC 31-15-7-2. As for the annuity issue, a general finding or judgment will control as to issues upon which the trial court has not expressly found, and the special findings will control the issues that they cover. *Clark v. Hunter*, 861 N.E.2d 1202, 1206 (Ind. Ct. App. 2007).

Special findings will be reversed only if they are clearly erroneous. *Id.* Findings are clearly erroneous only when a review of the record leaves us firmly convinced that a mistake has been made, and a judgment is clearly erroneous when the findings of fact and conclusions thereon do not support it. *Id.* We will disturb the judgment only when there is no evidence supporting the findings or the findings do not support the judgment. *Id.* “A general judgment, on the other hand, will be affirmed upon any legal theory consistent with the evidence.” *Id.* In conducting our review, we neither reweigh the evidence nor judge the credibility of the witnesses. *Id.* We view the evidence and any reasonable inferences therefrom in the light most favorable to the judgment. *Heagy v. Kean*, 864 N.E.2d 383, 388 (Ind. Ct. App. 2007), *trans. denied*.

I. Incapacity Maintenance

Wife first argues that the trial court erred when it found she was not incapacitated. We agree. A trial court’s decision to award maintenance is purely within its discretion, and we will only reverse if the award is against the logic and effect of the facts and circumstances of the case. *Matzat v. Matzat*, 854 N.E.2d 918, 920 (Ind. Ct. App. 2006) (citing *Augspurger v. Hudson*, 802 N.E.2d 503, 508 (Ind. Ct. App. 2004)). “A maintenance ... award is designed to help provide for a spouse’s sustenance and support.” *McCormick v. McCormick*, 780 N.E.2d 1220, 1224 (Ind. Ct. App. 2003). “The essential inquiry is whether the incapacitated spouse has the ability to support himself or herself.” *Id.*; *see also* IC 31-15-7-2(1). Our Supreme Court has held that a trial court’s discretion to award incapacity maintenance under IC 31-15-7-2(1) is limited to those instances

where the trial court has found that the spouse's ability to work and support himself or herself is materially affected. *Cannon*, 758 N.E.2d at 526.

Here, the trial court found that the Wife was sixty years old, suffered from Lyme disease, a chronic condition, and had not worked for forty years. It further found that because she was able to drive a car and "work in at least a part-time capacity," Wife was not incapacitated, and was not entitled incapacity maintenance, but was entitled to temporary rehabilitative maintenance based on her limited earning capacity, her lengthy absence from the job market, and the time and expense necessary to enable her to find appropriate employment. *Appellant's App.* at 9.

The trial court did not find that the Wife was capable of full-time employment or will be capable of such employment when her temporary rehabilitative maintenance runs out in three years. Husband opined only that the Wife could "*probably* work part-time." *Tr.* at 39 (emphasis added). The trial court did not set forth how it will be possible for the Wife to rehabilitate herself during that time such that she will be able to hold meaningful employment. The trial court's findings establish that the Wife's ability to work and support herself was materially affected. Its failure to award incapacity maintenance was clearly erroneous.

II. Survivor Benefit

Wife also argues that the trial court erred when it did not award her the survivor benefit associated with Husband's civil service offset annuity. "The division of marital assets is a matter within the sound discretion of the trial court." *Smith v. Smith*, 854 N.E.2d 1, 5 (Ind. Ct. App. 2006). The presumption that the dissolution court correctly

followed the law and made all the proper considerations when dividing the marital estate is one of the strongest presumptions applicable to our consideration on appeal. *Id.* at 6. “Thus, we will reverse a property distribution only if there is no rational basis for the award.” *Id.*

Wife argues that the trial court should have awarded her Husband’s survivor benefit so that if he dies she can continue to receive health insurance. Wife asserts:

[she] has been unable to work for at least thirty (30) years, that she had never been able to accumulate the necessary work history credits to entitle her to her own social security benefits, that she had no retirement benefits of any sort in her own name, and that she is, and would most likely remain, unable to be meaningfully employed, and therefore, unable to support herself.

Appellant’s Br. at 17. Wife contends that the \$217.00 Husband would have to pay to continue the survivor’s benefit “seems reasonable for [Husband] to bear given [Wife’s] great need for the benefit.” *Id.* at 18. She also dismisses the notion that Husband might remarry and want his spouse to receive the survivor’s benefit.

Even assuming that the record supports all of Wife’s contentions, we may not reweigh the evidence or second-guess the trial court’s decision not to award Wife the survivor benefit. The trial court was well aware of Wife’s situation and compensated for her medical condition and lack of work history by awarding her maintenance and approximately 61% of the marital estate. Wife has failed to establish that the trial court’s decision not to award her the survivor benefits was an abuse of discretion.

In light of the total distribution of marital property, the trial court did not abuse its discretion in declining to award Wife Husband’s survivor benefit. However, we remand

with instructions to the trial court to vacate Wife's award of rehabilitative maintenance and to provide incapacity maintenance.

Affirmed in part and reversed in part.

ROBB, J., concurs.

BARNES, J., dissents with separate opinion.

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Appellant-Respondent,)	
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vs.)	No. 91A02-0704-CV-366
)	
MELVIN LOWE,)	
)	
Appellee-Petitioner.)	

BARNES, Judge, concurring in part and dissenting in part with separate opinion.

Although I agree with the majority’s analysis on the issue of the survivor benefit, I respectfully disagree with its decision regarding incapacitation maintenance. It is undisputed that Marilyn was diagnosed with Lyme disease and suffers ongoing medical complications as a result of it. In my opinion, however, whether these complications amount to physical incapacitation for purposes of Indiana Code Section 31-15-7-2(1) was a question for the trial court to decide based on its assessment of the evidence.

Where the trial court has entered findings of fact and conclusions thereon, the standard of review is well-settled:

We do not weigh the evidence nor judge the credibility of witnesses, but rather consider only that evidence most favorable to the judgment, together with reasonable inferences which can be drawn therefrom. If, from that viewpoint, there is substantial evidence to support the finding of the trial court, it will not be disturbed, even though we might have reached a different conclusion if we had been the triers of fact. If there is any evidence or legitimate inferences to support the finding and judgment of the trial court, this Court will not intercede and use its judgment as a substitute for that of the trial court.

In re Marriage of Richardson, 622 N.E.2d 178, 179 (Ind. 1993) (citations omitted).

Marilyn presented no evidence that she attempted to work but could not continue to do so because of her Lyme disease or even that she had sought work but was not hired because of her disease. The fact Marilyn has not been employed during most of the marriage is not conclusive evidence of her physical or mental incapacitation. Melvin testified that Marilyn had not been to the doctor for her Lyme disease for two to three years. He opined that Marilyn could “probably work part-time.” Tr. p. 39. Considering the evidence most favorable to the trial court’s judgment, I believe that Marilyn has not established that the trial court’s finding regarding the alleged incapacitation is clearly erroneous. In my opinion, to conclude otherwise requires us to reweigh the evidence, a task we may not undertake. I vote to affirm the trial court in all other respects.